Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JMYK, P.C., A CALIFORNIA PROFESSIONAL CORPORATION; JOHN M. KEEFE, INDIVIDUALLY,
PETITIONERS

v.

WASHINGTON STATE BAR ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the United States Constitution prevent a federal court from exercising personal jurisdiction over civil proceedings involving a lawyer's suspension pursuant to the standards of Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982), on the grounds that the punishing sanction occurred in another state, where the requirements of a state's long-arm statute are met, and when the relationship to the forum makes the exercise of personal jurisdiction reasonable?

2. Is venue in an action against a Bar Association under 42 U.S.C. Section 1983 for a suspension imposed in alleged violation of the Middlesex standards present in a federal district outside the state where the prosecution and the disciplinary sanctions occurred, when activities underlying the claims have occurred in the forum district, and where harm in the forum giving rise to the claims has occurred?

PARTIES TO THE PROCEEDING

The following list identifies all parties before the Court of Appeals: JMYK, P.C., a California Professional Corporation, John M. Keefe, and the Washington State Bar Association.

As provided by Rule 29.6 of the Rules of this Court, petitioners state the following: JMYK, P.C., is a California Professional Corporation, and has no parent, subsidiary or publicly held corporations or companies owning 10% or more of the corporation's stock.

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OPINIONS BELOW

The opinions of the Ninth Circuit Court of Appeals and the District Court, not officially reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 13, 2005. By order of the Court, entered on August 19, 2005, the date for filing the petition for writ of certiorari is October 17, 2005. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. §1391(b), 42 U.S.C. § 1983,Washington Rule for Enforcement of Lawyer Conduct 2.12(a), and Washington Rules of Professional Conduct 1.2 and 1.7(b) are set out in their entirety in the Appendix hereto. Appendix, "App." 25a-29a.

STATEMENT OF THE CASE

In April 2004, petitioners, residents of California, brought this action under 42 U.S.C. § 1983 in the United States District Court for the Central District of California against the Washington State Bar Association. The action arises from a State Bar decision of suspension against petitioner on December 19, 2003. App., 13a.

The complaint alleges that the Washington State Bar Association suspended petitioner for violating State Bar conflict of interest rules in arguments in the appeal of a civil case that reversed the liability of the clients and petitioner under summary judgment orders for attorney fees of approximately $50,000 that had been entered against them. App. 23a, R.2, 3.[1] Petitioners' clients were exonerated in the appeal. In December 2001, the Washington Court of Appeals reversed and vacated the summary judgment orders. In April 2002, the State Bar filed a formal complaint against petitioner, charging that petitioner did not obtain the consent of the clients to the arguments in the appeal that vacated petitioners' liability under the orders in violation of Washington Rule of Professional Conduct ("WRPC") 1.2 (client consultation), and WRPC 1.7(b) (client consent in writing after consultation and a full disclosure of the material facts). App. 12a, R. 2, 27.

The State Bar's charges culminated in a six month suspension after a hearing in Washington on these charges in the absence of testimony or statements from the clients. The clients reside out-of-state. Their

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1 Petitioners' clients had settled in an earlier case for funds and stock in a NASDAQ listed company. The agreement has a provision for legal fees and costs to the party(ies) that substantially prevail in proceedings arising out of the agreement. The order granting summary judgment provided, "Counsel's arguments did not prevail, but were not frivolous." The order granting attorney fees was entered against "Plaintiffs and/or their attorney of record." App. 23a. The Washington Court of Appeals reversed and vacated the orders holding that there were material issues of fact on the clients' claims, thus requiring reversal of the dismissal of the claims. It also held that the inclusion of appellants' counsel in the judgment was baseless. R. 2, 3.

testimony by telephone and their sworn written statements were excluded at the hearing. App. 12a, R. 4, 25, 41.[2]

In accordance with the rules alleged to have been violated by petitioner, on December 19, 2003, the Bar Association entered formal findings of fact, conclusions of law, and a suspension against petitioner. The hearing officer summarized the burden of proof necessary to sustain the charges as follows:

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2 The Washington Rules for Enforcement of Lawyer Conduct, "ELC," provide for the full participation of witnesses in disciplinary proceedings, which includes the presentation of witnesses by televison, telephone, or other electronic means. ELC 10.13(d), 10.14(e); RCW 34.05.449(3). See *Beltran-Tirado v. I.N.S.*, 213 F.3d 1179, 1185-86 (9th Cir. 2000); *Official Airline Guides v. Churchfield Pub.*, 756 F.Supp. 1393, 1398-99 n.2 (D.Or. 1990), *aff'd*, 6 F.3d 1385 (9th Cir. 1993); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 129 F.R.D. 424, 425 (D.Puerto Rico 1989); *Elson v. State*, 633 P.2d 292, 302 (Alaska App. 1981), *aff'd*, 659 P.2d 1195 (Alaska 1983); *State v. Aldape*, 307 N.W.2d 32, 43 (Iowa 1981). ELC 10.14 (d) & (e) provide that the Washington Rules of Evidence and the Washington Administrative Procedures Act ("APA") should be looked to for guidance. Under the APA, and in particular, RCW 34.05.449(3), all or part of the hearing may be conducted by electronic means.

ELC 10.13(d) provides in material part, "Except as provided in subsection (b)(2) and rule 10.6, witnesses must testify under oath." ELC 10.13(b)(2) states in relevant part that the hearing officer or panel must admit a deposition regardless of the deponent's availability, and that an affidavit or declaration is also admissible if the facts stated are within the witness's personal knowledge, the facts are set forth with particularity, and show that the witness could testify competently.

> In attorney disciplinary proceedings, state bar disciplinary counsel has the burden of establishing an act of misconduct by a clear preponderance of the evidence. RLD 4.11(b)/ELC 10.14; *In re Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988)....
>
> ****Where the clear preponderance standard is imposed, an allegation proven by a simple preponderance, must of course, fall by the wayside. An attorney accused of unethical conduct, if proven, wears the stigma of the sanction like a scarlet letter whether as a practicing attorney or on another stage of life for years beyond. R. 30, 32.

The decision announced that the Bar Association had proven its contentions of misconduct "by a clear preponderance of the evidence." R. 26. The decision cited no specific evidence to support the suspension, but merely issued conclusory statements mirroring the language of the Rules of Professional Conduct.

The federal action alleges that petitioner's conduct in the appeal and the claims of a conflict of interest do not violate the Rules of Professional Conduct. The complaint is based on specific factual grounds that petitioner consulted with the clients about a potential conflict of interest, and that the clients gave their consent in accordance with rules to the conflict of interest alleged. It is based on explicit grounds that the evidence of the clients by deposition, in sworn written statements, and in their offered testimony absolved

petitioner of the charges. The complaint alleges that this evidence was before the Bar Association in the disciplinary proceedings against petitioner. App. 12a, R. 3, 4.

The amended complaint alleges that the Bar Association administered, approved of and pursued these claims with the requisite degree of culpability, and that it acted with deliberate indifference to the constitutional rights of the plaintiff and for the purpose of depriving plaintiff of the license to practice law. R. 4, 8.

In May 2004, a motion to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., was filed in the District Court on behalf of the Bar Association. On June 14, 2004, the District Court entered its order granting defendant's motion to dismiss the complaint without prejudice, holding that dismissal was warranted for improper venue (Fed. R. Civ. P. 12(b)(3)), and lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)).[3]

With respect to venue, the District Court held that a substantial part, if not all, of the events occurred in Washington, that plaintiff is the attorney in a case there which gave rise to the disciplinary proceedings,

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3 No factual matter was offered in support of the motion to dismiss other than the Bar Association's findings of fact, conclusions of law, and decision of suspension, and a declaration from its counsel in federal court reciting the status of the proceedings, petitioner's suspension, and that an appeal had been filed by petitioner with the Washington State Disciplinary Board. Petitioner offered applications for employment with public entities in essence verifying the disclosure of the suspension to education authorities. R. 56, 57.

and the latter proceeding was conducted before the Bar Association. The Court held that all underlying actions arose from events occurring in Washington. App. 15a-16a. Contemporaneous with the holding of dismissal for improper venue, the District Court also held that personal jurisdiction was absent in this case. The Court noted, in its oral opinion in the colloquy from the bench,

> Mr. Keefe. Okay, what we'd ask ... would be permission to amend the complaint to show that [consistent] with the statute that part of the events occurred in this district giving rise to venue. And I believe that ...we can show that.
>
> The Court. No, I won 't give you the opportunity to amend the complaint. This is a case if you 're going to sue the Washington State Bar, you're going to have to sue them in Washington, either in State Court or the Federal Court up there depending on the theory of recovery that you intend to bring. The Washington State Bar does not do business in the State of California. They have no general or specific jurisdiction [to] evoke this Court's jurisdiction. App. 21a.
>
> Mr. Welden. Well, what I want to say your Honor, I would ask that it be dismissed with prejudice, but I understand the Court's ruling.
>
> The Court. No, because if he has issues ... he can litigate those issues in Washington

> ... this District Court has no jurisdiction over that, over the claims he's asserting here.
>
> Mr. Welden. Correct. And my position would be that ... the District Court in Washington would not have subject matter jurisdiction either.
>
> The Court. Well, he has ... a 1983 case, so he can file in the Federal Court in Washington. App. 9a.

With respect to subject matter jurisdiction, the District Court held that dismissal is proper on this separate basis. It noted that the evidence submitted by the Washington Bar showed that the suspension must be reviewed by the Disciplinary Board and sent to the Supreme Court for a final order. It held that as such, plaintiffs' complaint is premature since no official action has been taken with respect to the suspension. App. 20a-21a.

The District Court also held that even assuming the suspension was timely challenged, federal courts do not have jurisdiction to review state court orders concerning the discipline of state bar members. (citing *Doe v. State Bar of California*, 582 F.2d 25 (9th Cir. 1978); *Mackay v. Nesbett*, 4 12 F.2d 846, (9th Cir.), *cert. denied*, 396 U.S. 960 (1969)). App. 21a-22a.

An appeal was timely filed with the Ninth Circuit Court of Appeals. On April 13, 2005, the Court issued a memorandum decision affirming the District Court. The Court of Appeals held that this action was

properly dismissed for improper venue on the grounds that the Washington State Bar Association does not reside in, nor did a substantial part of the events forming the basis of the claims take place in the Central District of California. (citing 28 U.S.C. §1391(b)(1)-(2); *King v. Russell* 963 F.2d 1301, 1304 (9th Cir. 1992)). App. 2a.

The Court of Appeals did not address the issue of subject matter jurisdiction, affirming on venue grounds, as noted.

REASONS FOR GRANTING THE PETITION

I. *The Petition Presents the Important Federal Question of Whether Personal Jurisdiction in an Action Against a Bar Association for a Suspension In Violation of the Standards of Middlesex Ethics Comm. v. Garden State BarAss'n., 457 U.S. 423 (1982), is Present in a Federal Judicial District Outside the State Where the Effects Giving Rise to the Claim are Alleged to Have Occurred.*

As matters stand, petitioners cannot realistically pursue their claims in Washington state, despite the District Court's oral opinion that petitioners can file their section 1983 case in federal court in Washington. This is based on the District Court's holding that "federal district courts do not have jurisdiction to review state court orders concerning the discipline of state bar members." (Citing *Doe v. State Bar of California* 582 F.2d 25 (9th Cir. 1978); *Mackay v. Nesbett* 412 F.2d 846 (9th Cir.), *cert. denied* 396 U.S. 960 (1969)).

The District Court held that *Middlesex Ethics Comm. v. Garden State Bar Ass'n.* 457 U.S. 423 (1982), is not applicable here because "[a]t issue in *Middlesex*, was whether a federal court should abstain from considering the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court."

The District Court held that "Plaintiff is not challenging the constitutionality of any particular rules; rather, he is challenging the specific actions taken at his hearing. More specifically, he alleges that the disciplinary proceeding was conducted in a manner unfair to him. Such allegations, however, cannot be entertained by this Court. See *Rosenthal, Justices of the Supreme Court of California*, 910 F.2d 561, 566 (9th Cir. 1990)." App. 2a.

Accordingly, unless the merits of the jurisdictional issues are reached by this Court, petitioner, impressed with a suspension that meets the standards of this Court's decision in *Middlesex*, may be barred from pursuing this action in Washington.[4]

This case presents the fundamental and recurring issues of *in personam* jurisdiction and venue in the context of this Court's decision in *Middlesex Ethics Comm.*, and how courts are to resolve these

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4 Principles of res judicata and the law of the case doctrine are probable defenses to a federal action under 42 U.S.C. § 1983 filed in Washington. See *International Union v. Karr*, 994 F.2d 1426, 1429 (9th Cir.1993) (res judicata); *Pit River Home and Agr .Co-Op Ass'n v. U.S.*, 30 F.3d 1088, 1096-97 (9th Cir. 1994) (law of the case).

issues when a section 1983 case is filed in a federal judicial district outside the state where the effects giving rise to the claim are alleged to have occurred.

A. *The Conclusion that Personal Jurisdiction is not Present in this Case is Contrary to this Court's Decision in Calder v. Jones, 465 U.S. 783 (1984).*

The early case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) focused on due process and a defendant's contacts with the forum. The Due Process Clause of the Fourteenth Amendment is satisfied if the assertion of personal jurisdiction over a nonresident defendant is predicated on "minimum contacts" between the defendant and the State "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

More recently, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 108-09 (1987), *and Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), this Court emphasized that the "constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established 'minimum contacts' in the forum State." These cases also synthesized the foreseeability component from *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in the due process analysis. *Asahi Metal Industry Co.*, 480 U.S., at 109-113, *Burger King Corp.*, 471 U.S., at 474.

In *World-Wide Volkswagen Corp.*, the Court affirmed "[t]he relationship between the defendant and

the forum" as the test of reasonableness, and emphasized foreseeability and other relevant factors in the due process equation. 444 U.S., at 292, 297. "[T]he foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.*, at 297.

In evaluating "minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984).[5]

In *Calder v. Jones*, 465 U.S. 783, 791 (1984), this Court, in a unanimous opinion by Justice Rehnquist, held that the purposeful availment standard in the personal jurisdiction analysis can be met if intentional conduct in a foreign state was calculated to cause injury in the forum state.

Calder involved an allegedly li ious story in the National Enquirer about a California entertainer. The decision found that petitioner's "intentional, and allegedly tortious, actions were expressly aimed at California." Petitioners wrote "an article they knew would have a potentially devastating impact upon respondent. And they knew the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances,

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5 California's long-arm statute authorizes the exercise of jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10; *Asahi Metal Industry Co.*, 480 U.S., at 106.

petitioners must 'reasonably anticipate being haled into court there....'" "An individual injured in California," wrote the Court, "need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California." The Court's opinion concluded that, "Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California." 465 U.S., at 788-90.[6]

This Court has never directly held whether personal jurisdiction in a case involving fair evidence of an alleged illicit suspension under the standards of the *Middlesex* decision is present in a federal district outside the state where the effects giving rise to the claim are maintained to have occurred.

This case is similar to *Calder*, but it is different because, as contended by the Bar Association below, it resides solely within the state of Washington, its offices are in Seattle and Olympia, petitioner is a lawyer

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6 The Courts in *Myers v. Bennett Law Offices*, 238 F.3d 1068 (9th Cir. 2001), and *Gordy v. Daily News, L.P.* 95 F.3d 829 (9th Cir.1996), came to similar conclusions. In *Myers*, the Ninth Circuit held that jurisdiction in Nevada over Utah residents in a case under the Fair Credit Reporting Act was proper when a law office was found to have acted intentionally in requesting credit reports on Nevada residents. The request was expressly aimed at Nevada because it individually targeted Nevada residents whom appellees knew were Nevada residents. The Court held that the effects of the conduct, invasion of privacy, were felt in Nevada. 238 F.3d, at 1073-74. In *Gordy*, the Court held that in a libel case, jurisdiction in California was appropriate because a major forum-related activity was the writing of an alleged libel in New York that had a tortious effect on a California resident. "It is reasonable to expect the bulk of the harm from defamation of an individual to be felt at his domicile." 95 F.3d, at 833.

admitted in Washington, the facts giving rise to the disciplinary proceeding involve a case in Washington courts, and the latter proceeding was conducted before the Bar Association in Washington. App. 18a-19a, R. 16.

Its main argument focuses on a lack of contacts with California. It is to be noted that a foreign act with forum effects can confer jurisdiction over a defendant who has never physically entered the forum. *Burger King*, 471 U.S., at 476.

The harm is the same to the torts of libel and bad faith, and, as it bears on the latter, is governed by federal statutes, in particular 42 U.S.C. § 1983, federal case law under *Middlesex* and *Younger v. Harris*, 401 U.S. 37 (1971), and Washington Rule for Enforcement of Lawyer Conduct ("ELC") 2.12 (2002). Under the latter rule, the Bar Association has consented to suits against it.

With respect to the suspension, it must be reported to public authorities with whom petitioner has sought employment, and must be reported to California bar authorities with whom petitioners cannot realistically register with until the conclusion of the proceeding. Reporting requirements are tangible and have the objective effects of preventing or hindering registration and employment in California. As the Bar Association has itself stated, "An attorney accused of unethical conduct, if proven, wears the stigma of the sanction like a scarlet letter whether as a practicing attorney or on another stage in life for years beyond." According to the Bar Association, it has proven its case by a "clear preponderance of the evidence." The decision is a public record.

The effects of the constitutional violations as alleged under 42 U.S.C. § 1983 are felt in California. This appears to be firmly supported by this Court's decisions in *Calder* and *Keeton*, where the Court wrote,"... the brunt of that injury would be felt," and where "[t]he victim of a libel, like the victim of any other tort, may choose to bring suit ...." *Calder*, 465 U.S., at 789-90; *Keeton*, 465 U.S., at 780.

The targeting arises because petitioner is an individual who lives and works in California. The actions were expressly aimed at California because the Bar Association knew that the main repercussions of the suspension, alleged to be unconstitutional and in violation of the bad faith directives in *Middlesex*, like the effects of a libel, would be felt in the State where petitioner lives. It knew that petitioner would likely suffer harm there.

The reasonableness of the exercise of jurisdiction depends on an evaluation of several factors. "A court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining effective relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering substantive social policies.'" *Asahi Metal Industry Co.*, 480 U.S., at 113; *Burger King*, 471 U.S., at 477.

A defendant must make a compelling showing that the presence of these or other considerations would render jurisdiction unreasonable. *Id.* It is true that petitioners could have sued in Washington, but

"[a]n individual injured in California need not go to [Washington] to seek redress from persons who, though remaining [in Washington], knowingly cause the injury in California." *Calder*, 465 U.S., at 790. California has "a strong interest in providing an effective means of redress for its residents tortiously injured." *Gordy*, 95 F.3d, at 836. Moreover, the existence of an alternative forum (*e.g.*, the federal courts in Washington) and the burden of defending in California cannot appreciably satisfy the burden of showing that jurisdiction is unreasonable. As a matter of due process, the process it has received thus far shows that this is not a consideration.

The Bar Association did not present other arguments or justifications showing that the exercise of specific, personal jurisdiction would be unreasonable. Accordingly, it must reasonably anticipate being haled into court here, as in a libel action, for the effects of an illicit suspension in California.

B. *There was Sufficient Evidence of a Violation of the Standards in Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982) to Warrant a Determination of Personal Jurisdiction in California.*

In *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), this Court held, "When a federal court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." The Court continued, "In appraising the

sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In *Summit Health, Ltd. v. Pinhas* 500 U.S. 322, 325 (1991) this Court more recently held on a Rule 12(b)(6) motion, "[W]e must assume the truth of the material facts as alleged in the complaint." In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* 507 U.S. 163, 168 (1993), a case under 42 U.S.C. § 1983, the Court explained:

> [T]he liberal system of "notice pleading" set up by the Federal Rules [,] Rule 8(a)(2) ... do[es] not require a claimant to set out in detail the facts on which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim " that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

The complaint specifically alleges that petitioner consulted with the clients about a potential conflict of interest, and that the clients gave their consent to the conflict of interest alleged. It is based on explicit grounds that the evidence of the clients by deposition, in sworn written statements, and in their offered testimony absolved petitioner of the charges. The complaint alleges that this evidence was before the Bar Association in the disciplinary proceedings against petitioner.

These allegations in the complaint establish a prima facie case under Rule 12(b)(6) that the bar proceedings were brought without a reasonable expectation of obtaining a valid disciplinary violation, conviction or judgment. See *Kugler v. Helfant*, 421 U.S. 117, 126 n.6 (1975); *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003). They meet the standard of a short and plain statement of the claim, and, combined with the allegations that it acted with the requisite degree of culpability and with deliberate indifference to the constitutional rights of the plaintiff, are sufficient to state a claim under 42 U.S.C. § 1983. They are also sufficient to establish bad faith under *Middlesex Ethics Comm. v. Garden State Bar Ass'n.*, 457 U.S. 423, 435, 437 (1982), in bringing the proceedings and suspending petitioner in the proceedings.

In *Middlesex* the New Jersey Bar Association brought disciplinary charges against respondent, a member of the New Jersey Bar. Rather than filing an answer to the charges under disciplinary procedures, respondent (and others) filed suit in federal court contending that the disciplinary rules violated respondent's First Amendment Rights, and that the rules were facially vague and overbroad. The district court granted respondent's request for trial (a two-day hearing) on these issues, allowing respondent an opportunity to establish bad faith, harassment, or other significant circumstances which would justify an exception to *Younger* abstention. See *Younger v. Harris*, 401 U.S. 37 (1971). After the hearing, the District Court determined that the evidence did not justify an exception to the *Younger* abstention doctrine. *Middlesex* 457 U.S., at 429.

This Court in *Middlesex* held that the policies underlying *Younger* are fully applicable to non-criminal judicial proceedings in cases like this (*i.e.*, pending state disciplinary proceedings). 457 U.S., at 432-34. The Court noted that respondents had not challenged the District Court's findings regarding bad faith or harassment or its findings that the state rules were not flagrantly unconstitutional. The Court held that in the absence of bad faith, harassment, or other unusual circumstances, the principles underlying *Younger* were appropriate. 457 U.S., at 437.

Contrary to the Bar Association's arguments below, it is clear under *Middlesex* that federal courts have subject matter jurisdiction to entertain the merits of cases like the present case were bad faith, harassment or other important circumstances are present in an original federal court action. Where evidence of these issues is present, abstention is not appropriate. The Court's decision in *Middlesex* models its decisions in earlier cases, where the principles of *Younger* and its tests were held to be applicable in civil cases. See *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611-12 (1975).

Like these cases, this is a federal civil action under 42 U.S.C. § 1983. "Section 1983 was originally §1 of the Civil Rights Act of 1871. 17 Stat. 13. It was modeled on § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Mitchum v. Foster*, 407 U.S. 225, 238 (1972). "Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1866, 14 Stat. 27, to provide an independent avenue for protection of federal constitutional rights. The remedy

was considered necessary because 'state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.'" *Pulliam v. Allen*, 466 U.S. 522, 540 (1984).

The cases cited by the Bar Association below, *Mackay v. Nesbett* 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969), and *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966), pre-date *Middlesex* and *Pulliam* as well as this Court's cases applying the principles of *Younger* and its tests in civil cases. *Doe v. State Bar of California* 582 F.2d 25 (9th Cir. 1978) also precedes these cases and has no contemporary bearing in this case.

A further and compelling ground for the exercise of subject matter jurisdiction in this case are the Washington Rules for Enforcement of Lawyer Conduct.

ELC 2.12(a)(2002)provides in material part:

> (a) Association an Its Agents. No cause of action accrues in favor of a respondent lawyer or any other person, arising from an investigation or proceeding under these rules, against the Association ... (including but not limited to its staff, members of the Board of Governors, the Disciplinary Board ... hearing officers, disciplinary counsel ...) provided only that the Association or individual acted in good faith. The burden of proving bad faith in this context is on the person asserting it.

There is no doubt that the Bar Association may haled as a party in court for conduct encompassing an infringement of its duty of good faith, and conversely, for conduct comprising bad faith. There is no limitation in its rules regarding the assertion of rights in state or federal court, and as explained above, the bad faith distinctions delineated in *Younger* and subsequent cases provide a clear basis for subject matter jurisdiction in cases like or similar to the present case. Also, the rule does not reference, limit or preclude the assertion of actions regarding pending proceedings where evidence of a breach of good faith and/or evidence of bad faith, harassment or other important circumstances are present in a federal court action.

The question is whether these ingredients are present on a motion to dismiss or for a preliminary injunction or whether there are genuine issues of material fact on a motion for summary judgment that warrant denial and/or relief with respect to the motion. See *Baffert*, 332 F.3d, at 617, 621 (noting that if state licensing proceedings are conducted in bad faith or to harass the litigant, or other extraordinary circumstances exist, the district court may exercise jurisdiction even when the criteria for *Younger* abstention are met).

All of the essential elements are present in this case. The consequence of the holdings, when there is competent evidence of a violation of the standards in *Middlesex* to warrant a determination of personal jurisdiction in the forum state, is to compel a plaintiff to seek redress in a foreign jurisdiction far from the forum where the effects of potentially devastating and permanent injury, in this case, a federal action for a

suspension in violation of the *Middlesex* standards, are felt. This is contrary to the Court's analysis in the *World-Wide Volkswagen Corp.* and *Calder* cases. This Court has yet to address the vital but recurring issues raised in this case, which blend the abstract and difficult aspects of a wrongful suspension with the nebulous principle of "fair play and substantial justice " as applied to a plaintiff in these undecided circumstances.

II. *The Petition Presents the Important Federal Question of Whether Venue in an Action Against a Bar Association Under 42 U.S.C.§ 1983 is Present in a Federal Judicial District Outside the State Where Substantial Activities Giving Rise to the Claim are Alleged to Have Occurred.*

The Court of Appeals indicated that the primary obstacle preventing venue in the Central District of California was its decision in *King v. Russell* 963 F.2d 1301 (9th Cir. 1992), and the venue statute, 28 U.S.C. § 1391(b). This case presents facts considerably different from those which the Court held insufficient to support venue in *King*. Moreover, this case comes within the 1990 amendments to the venue statute, and the holdings in a number of circuits which are, in a venue context, parallel to or indistinguishable from this action.

28 U.S.C. § 1391(b) states that venue is proper in a judicial district if "a substantial part of the events or omissions giving rise to the claim occurred" in that district. The statute was amended in 1990 in order to

broaden the venue provisions.[7] The commentary following the 1990 revisions to § 1391 states:

> The fact that substantial activities took place in District B does not disqualify District A as proper venue as long as "substantial" activities took place in A, too. Indeed, District A should not be disqualified even if it is shown that the activities in District B were more substantial, or even the most substantial. Any other approach would restore the pinpointing problem that created the difficulties under the now discarded "claim arose" standard. If the selected district's contacts are "substantial," it should make no difference that another's are more so, or the most so.

First of Michigan Corp. v. Bramlet, 141 F.3d 260, 263 (6th Cir. 1998) (citing David D. Siegel, Commentary on the 1988 and 1990 Revisions of Section 1391(a)(2), 28 U.S.C.A. § 1391 (1993).

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7 The amendments are iscussed in *Cottman Transmission Systems, Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). Section 1391 was amended by the Judicial Improvements Act of 1990 in response to a recommendation of the Federal Courts Study Committee. See *Report of the Fed. Courts Study Comm.* 94 (Comm. Print 1990). The report pointed out that the reference in the earlier version of section 1391(b) to the district "in which the claim arose " led to wasteful litigation whenever several different forums were involved in transactions leading up to the dispute. The House Report noted that the new language was in accord with that recommended earlier by an American Law Institute study. See H.R. Rep. No. 734, 101st Cong., 2nd Sess. 23 (1990), reprinted in 1990 U.S.C.C.A.N. 6860, 6869.

This is a case involving federal question and civil rights jurisdiction under 28 U.S.C. § 1331 and § 1343, therefore involving 28 U.S.C. § 1391(b), as opposed to diversity jurisdiction under 28 U.S.C. § 1391(a), but the considerations encompassing substantial activities are the same. See *Bates v. C&S Adjusters, Inc.*, 980 F.2d 865, 867-68 (2nd Cir. 1992) (noting that the new statute, 28 U.S.C. § 1391(b),"does not, as a general matter, require the District Court to determine the best venue"; "we must determine only whether a 'substantial part of the events ... giving rise to the claim' occurred in [this district]"); *First of Michigan Corp.* 141 F.3d, at 263 (citing *Bates, supra*, and *Setco Enterprises Corp. v. Robbins*, 19 F.3d 1278, 1280-81 (8th Cir. 1994), and stating that under the amended statute, 28 U.S.C. § 1391(a), courts "no longer ask which district among the two or more potential forums is the 'best' venue[,] [r]ather [they] ask whether the district plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts.").

In *Nierbo v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939), this Court emphasized the distinction between jurisdiction and venue, writing that "[t]his basic difference between the court's power and the litigant's convenience is historic in the federal courts." In *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979), this Court in part held, "The question of personal jurisdiction, which goes to the court 's power to exercise control over parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum."

In *Leroy* the Court wrote, "In most instances, the purpose of statutorily specified venue is to protect

the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Id.*, at 183-84. In discussing venue, the Court weighed the actions in Idaho before determining that venue in Texas was inappropriate. *Id.*, at 185-86.

Leroy v. Great W. United Corp. was decided before the 1990 amendments to the venue statute. With respect to the more recent amendments to 28 U.S.C. § 1391(b) (1991), many of the considerations in *Leroy*, for example, the convenience of defendants and the location of evidence and witnesses, are useful in distinguishing between two or more plausible venues, but the new statute does not, as a general matter, require a District Court to determine the best venue. *Bates*, 980 F.2d, at 867; *Pecoraro v. Sky Ranch for Boys, Inc.*, 340 F.3d 558, 563 (8th Cir. 2003).

Moreover, under the amended statute, it is clear that there can be more than one district in which a substantial part of the events giving rise to the claim occurred. Every federal circuit that has addressed this question is in basic agreement with this position.[8]

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8 See *Cottman*, 36 F.3d, at 294 (the Third Circuit concurred with its holding in an earlier case, *Tefal, S.A. v. Products Int'l Co.*, 529 F.2d 495, 496 n.1 (3rd Cir.1976), stating "... if the infringement occurred in other districts as well, then venue could be proper in more than one district."); *Woodke v. Dahm*, 70 F.3d 983, 985 (8th Cir. 1995) ("The statute does not posit a single appropriate district for venue; venue may be proper in any of a number of districts, provided only that a substantial part of the events giving rise to the claim occurred there."); *Myers v.Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001), holding that, "... at least one of the 'harms' suffered by Plaintiff is akin to the tort of invasion of privacy and was felt in Nevada[;] [a]ccordingly, a substantial part of the events giving rise to the claim occurred in Nevada.").

The locus of the "events or omissions giving rise to the claim," as opposed to a "defendant's contacts with a particular district[,]" is the decided and implicit standard for determining venue. See *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 43 (1st Cir. 2001); *Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2nd Cir. 1992); *Cottman Transmission Systems, Inc. v. Martino* 36 F.3d 291, 294 (3d Cir. 1994); *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 264 (6th Cir. 1998); *Woodke v. Dahm*, 70 F.3d 983, 985-86 (8th Cir. 1995); *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001); *Jenkins Brick Co. v. Brenner*, 321 F.3d 1366, 1371 (11th Cir. 2003).

This does not precipitate the pinpointing problem that created the difficulties under the now discarded "claim arose" standard because, as the Courts have held, there can be more than one district in which a substantial part of the events giving rise to the claim occurred. Where harm or wrongful activity occurs is "a substantial part of the events or omissions giving rise to the claim for purposes of venue." See *e.g.*, *Myers*, 238 F.3d, at 1076 (in a tort action, the locus of the injury is a relevant factor, and holding that where one of the harms is felt in the forum is a substantial part of the events giving rise to the claim for purposes of venue); *Woodke*, 70 F.3d, at 985-86 (requiring that the event itself be wrongful in order to support venue).

The harm in this case, a suspension imposed in alleged violation of the *Middlesex* standards, strikes its mark in two venues. One is in Washington, where the suspension is a public record, and the other, as the Bar Association admits, is its scarlet letter, which petitioner began wearing in California almost two years ago, and

may wear indefinitely for years from now. The harm is immediate when a suspension or a disciplinary sanction is imposed. It is reported by State Bar authorities to the jurisdiction where the lawyer practices, and if he or she is not licensed in that jurisdiction, must be reported on public and private applications for employment, and to State Bar authorities a lawyer registers with. There are no uncertainties about the consequences of a suspension or disciplinary sanctions. The harm occurs in the district where that individual resides, and in every jurisdiction where he or she is licensed, and if the sanction is wrongful or imposed in bad faith, as it is alleged to be in this case, wrongful activity has occurred in those districts because they are places where harm or loss occurs. See *Uffner*, 244 F.3d, at 42-43 ("[M]any circuits have interpreted the 1990 amendment as evincing Congress's recognition that when the events underlying a claim have taken place in different places, venue may be proper in any number of districts.").

The Court of Appeals cited *King v. Russell* 963 F.2d 1301 (9th Cir. 1992) as the principle obstacle preventing venue in the Central District of California, but this case presents facts far different from those held ineffectual to support venue in *King*. In that case, the plaintiff filed suit in Arizona under the Truth in Lending Act against a number of defendants, alleging that they had caused her injuries from the foreclosure of a mortgage on her property in California. There apparently was no dispute that most of the defendants resided in California, and the only connection of Arizona to the suit was plaintiff's residence in Arizona. The Court of Appeals affirmed the dismissal of the action under 28 U.S.C. § 1391(b) for improper venue, and

concluded that it would not be in the interests of justice to transfer the case because the plaintiff "herself expressed no interest in transfer and because 'of the fact that the action smacks of harassment and bad faith on the plaintiff's part in that it appears that she filed it here after repeatedly losing on at least some similar claims in California.'" 963 F.3d, at 1304.

The case actually supports the presence of venue here because the District Court did not make findings of intent on petitioner's part in not transferring the case, and in fact, stated "...if you're going to sue the Washington State Bar, you're going to have to sue them in Washington, either in State Court or the Federal Court ... depending on the theory of recovery that you intend to bring." The District Court also stated, petitioner "can litigate those issues in Washington.... [H]e has ... a 1983 case, so he can file in the Federal Court in Washington." Furthermore, petitioner did not file this case after losing on similar claims elsewhere.

The interest at stake, a legal entitlement to practice law and earn a livelihood, free of tortious or arbitrary state intrusion, is one of the more important interests that can be adjudicated in the law. See *Barry v. Barchi*, 443 U.S. 55, 64, 66 (1979) (in a due process context, a professional horse trainer's license is protected). It is at least as important as the interest in a libelous story involved in *Calder*, may be more important than the right to privacy implicated in *Myers*, and is more important than a corporation's risk in the location of a suit seeking the invalidity of a state takeover law decided in *Leroy*.

The loss of a license to practice one's profession, when it is taken wrongfully, and in violation of specific federal and state standards, is, according to the decisions, related to the principal question of venue. The cases are appreciably clear that where harm or wrongful activity occurs is "a substantial part of the events or omissions giving rise to the claim for purposes of venue." At least one of the harms has occurred in California. Venue is therefore proper in the Central District of California.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,
John M. Keefe
Counsel of Record
Law Offices, JMYK, P.C.
1120 Fremont Avenue
South Pasadena, CA 91030
(626) 441-3263

No.

IN THE
Supreme Court of the United States

JMYK, P.C., AND JOHN M. KEEFE,

Petitioners,

v.

WASHINGTON STATE BAR ASSOCIATION,

Respondent.

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No. 04-56213

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JMYK, P.C., a California Professional Corporation;
JOHN M. KEEFE, individually,
Plaintiffs - Appellants,

v.

WASHINGTON STATE BAR ASSOCIATION,
Defendant - Appellee.

March 23, 2005**, Submitted** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).
April 13, 2005, Filed

COUNSEL: For JMYK, P.C., A CALIFORNIA PROFESSIONAL CORPORATION, JOHN M. KEEFE, ESQ., INDIVIDUALLY, Plaintiff - Appellants: John M. Keefe, Esq., LAW OFFICES OF JOHN M. KEEFE, A Professional Corporation, South Pasadena, CA.

For WASHINGTON STATE BAR ASSOCIATION, Defendant - Appellee: Robert Dean Weldon, WASHINGTON STATE BAR ASSOCIATION, Seattle, WA; Joel S. Miliband, Esq., RUS, MILIBAND & SMITH, Irvine, CA.

JUDGES: Before: B. FLETCHER, TROTT, and PAEZ, Circuit Judges.

OPINION: MEMORANDUM*

John M. Keefe appeals the judgment of the district court dismissing his civil rights action for lack of subject matter jurisdiction and improper venue. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion a dismissal for improper venue. Bruns v. NCUA, 122 F.3d 1251, 1253 (9th Cir. 1997). We affirm.

The district court correctly dismissed Keefe's civil rights action for improper venue because it is undisputed that the Washington State Bar Association does not reside in, nor did a substantial part of the events forming the basis of Keefe's claims take place in the Central District of California. *See* 28 U.S.C. § 1391(b)(1)-(2); King v. Russell, 963 F.2d 1301, 1304 (9th Cir. 1992) (per curiam).

All pending motions are denied as moot.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

04-2888

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JMYK, P.C., a California Profesional Corporation;
JOHN M. KEEFE, individually
Plaintiffs,

vs.

WASHINGTON STATE BAR ASSOCIATION; and
John Does and Jane Does 1-10,
Defendants.

MOTION TO DISMISS FOR IMPROPER VENUE; LACK OF SUBJECT MATTER JURISDICTION; FAILURE TO STATE A CLAIM; FAILURE TO SUE PARTIES CAPABLE OF BEING SUED

BEFORE THE HONORABLE DICKRAN TEVRIZIAN, UNITED STATES DISTRICT COURT JUDGE

APPEARANCES FOR:
Plaintiffs: JOHN M. KEEFE , PRO PER
Attorney at Law
1120 Fremont Avenue South
Pasadena, CA 91030

Defendant: LAUREL R ZAESKE, ESQ
Seventh Floor
600 Michelson Drive
Irvine, CA 92612
ROBERT F. WELDEN, ESQ.
(Appeared Telephonically)

Court Recorder: Ramona La Chapelle
Courtroom Deputy: Valencia R. Vallery
Transcriber: Victoria Manchester
Exceptional Reporting
Services Inc. P.O. Box 61850
Houston, Texas 77208
713 670-7774

Los Angeles, California;
Monday, June 14, 2004;
11:21 a.m.,
(Telephonic appearance by Robert Welden)
(Call to Order of the Court)

THE CLERK: Item, CV 04-2888, J.M.Y.K., P.C. et al versus Washington State, Motion to Dismiss for Improper Venue; Lack of Subject Matter Jurisdiction; Failure to State a Claim; Failure to Sue Parties Capable of Being Sued.

Counsel and/or parties, please make your appearances.

MR. KEEFE: John Keefe for the plaintiffs, your Honor. I've gone over the Tentative Ruling.

MS. ZAESKE : Good morning, your Honor, Laurel Zaeske appearing on -- local counsel appearing on behalf of Washington State Bar Association and Mr. Welden has requested to appear telephonically.

THE COURT: Yes. We're going to get Mr. Welden here telephonically.

(Dialing Mr. Welden)

MR. WELDEN: Hello, this is Robert Welden.

THE COURT: Mr. Welden?

Mr. WELDEN: Yes.

THE COURT: This is Judge Tevrizian. You're on the record in the case of J.M.Y.K., P.C., a California professional corporation, John M. Keefe, individually, plaintiffs versus Washington State Bar Association, Civil Case Number CV 04-2888-DT.

All right. I'm going to have counsel announce their appearances for the record.

MR. KEEFE: John Keefe for the plaintiffs.

MR. WELDEN: Robert Welden for the defendant Washington State Bar Association.

MS. ZAESKE: Laurel Zaeske, local council for the defendant, Washington State Bar Association.

THE COURT: All right. I've prepared a 12 Page Tentative Order, in this case, which I've circulated to the attorneys that are present in Court. The Order is an Order granting the defendant, Washington State Bar Association's Request for Additional Notice and granting without prejudice Defendant's Motion to Dismiss for Improper Venue and Lack of Subject Matter Jurisdiction.

I did receive some opposition that was filed, I believe, it was on June the 10th. I received it today because Friday the Court was closed for President

Reagan's funeral. However, I have reviewed the late opposition entitled, "Plaintiff's Supplemental Response, a Memorandum and Opposition to the Motion to Dismiss" and will not change my Tentative Order in this particular case.

Mr. Keefe, let me hear from you.

MR. KEEFE: Okay, your Honor. In going over the Tentative Ruling, there may he a few areas subject to a Motion for Reconsideration that may need to be studied. And with that said, we may file a Motion for Reconsideration, I don't know yet.

THE COURT: Well, a Motion for Reconsideration, you know -

MR. WELDEN: I'm sorry, your Honor, I can barely hear you.

THE COURT: a Motion for Reconsideration, Mr. Keefe, is limited as to what you can ask the Court to reconsider. I mean, it has to be a change in the law or some newly discovered facts. And, so I tell you that up front. But, right now there is still venue here in the State of California, specifically, the Central Vista (phonetic) California with regard to the State of Washington disciplining and/or bidding their members of their State Bar. So, I don't see how I have any jurisdiction.

MR. KEEFE: Okay. What we'd ask in that regard would be permission to amend the complaint to show that consentaneous (phonetic) with the statute that part of the events occurred in this district giving

rise to venue. And I believe that I can show that -- we can show that.

THE COURT: No, I won't give you an opportunity to amend the complaint. This is a case -- if you're going to sue the Washington State Bar, you're gong to have to sue them in Washington, either in the State Court or the Federal Court up there depending on the theory of recovery that you intend to bring. The Washington State Bar does not do business in the state of California. They have no general or specific jurisdiction that I evoke this Court's jurisdiction.

MR. KEEFE: Okay. Well, we don't know at this point whether there's general jurisdiction because there hasn't been any discovery. General jurisdiction would, of course, be based on its general contacts with the state of California and we don't know that at this point for that would be subject to discovery.

With respect to specific jurisdiction, its my position -- our position that the supplemental proceedings and the First Amended Claims arising out of the supplemental proceedings provide for venue in this district. I realize that a part of the Myers (phonetic) case deals with personal jurisdiction, but it also deals with the venue, that part of the decision by the Ninth Circuit is short, it's brief. But, it shows that - - it shows just on that one claim, I think, was invasion of privacy; like the Gordy (phonetic) detailed in this case, defamation; the effects were defamation dealt in California in the Myers case and invasion of privacy and the effects of that dealt in California. I realize that the effects deal with personal jurisdiction but when you read that part of the decision, there's no doubt that

terminology is considered in that discussion with venue. And just that one aspect of it, invasion of privacy, was sufficient to give the Court in Nevada, jurisdiction. And that's what we can show -- I can show here. The effects are so detrimental, it's constant and continual and it's potentially life long. The effects are here in California. I no longer reside in Washington --

THE COURT: But, Mr.

MR. KEEFE: -- I reside here in California.

THE COURT: -- yeah, but it doesn't make any difference. All the activity, in this particular case, occurred in the State of Washington. And just because you move around doesn't give you the right to sue on every --

MR. KEEFE: No.

THE COURT: -- vocation that you move to in the United. States. That' the problem. I mean, even with regard, you know, to convenience to witnesses; all the State Bar officials of Washington are located in the state of Washington. And, you know when you balance all of this out, this is not a change of venue case, at this particular point; you balance everything out, it's going to balance in favor of the state of Washington.

MR. KEEFE : okay. Well, I --

THE COURT: I mean, I really have no --

MR. KEEFE : -- okay
THE COURT: -- leeway here --

MR. KEEFE : Okay

THE COURT: -- I'm going to grant the defendant's Motion to Dismiss without prejudice so you can litigate in the State of Washington.

Mr. Welden, anything else you want to state for the record?

MR. WELDEN: Well, what I want to say, your Honor, I would ask that it be dismissed with prejudice, but I understand the Court's Ruling.

THE COURT: No, because if he, you know, has issues, he can litigate these issues in Washington; minus that, you know, this jurisdiction, this District Court has no jurisdiction over that, over the claims that he's asserting here.

MR. WELDEN: Correct. And my position would be that if the District Court in Washington would not have subject matter jurisdiction either.

THE COURT: Well, he has -- what is it – a 1983 case; so he can file in the Federal Court in Washington.

MR. KEEFE: Yes.

THE COURT: I'm going to stand with the Tentative order, the proposed Judgment that you lodged, I'll get back to you --

MR. KEEFE: What will --

THE COURT: -- I can modify it because it'll be dismissed -- there's no need for a Judgment. I'm just going to issue my order,

MR. WELDEN: All right.

THE COURT: Thank you.

MR. KEEFE: Thank you, sir. (This proceeding was adjourned at 11:30 a. m.)

04-2888

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JMYK, P.C., a California Profesional Corporation;
JOHN M. KEEFE, individually
Plaintiffs,

vs.

WASHINGTON STATE BAR ASSOCIATION; and
John Does and Jane Does 1-10,
Defendants.

ORDER GRANTING DEFENDANT WASHINGTON STATE BAR ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE; AND GRANTING WITHOUT PREJUDICE DEFENDANT'S MOTION TO DISMISS FOR IMPROPER VENUE AND LACK OF SUBJECT MATTER JURISDICTION

Filed 6/14/04, Entered 6/15/04

I. Background

This action is brought by Plaintiffs JMYK, P.C., a California Professional Corporation and John M. Keefe (collectively, "Plaintiffs") against Defendant Washington State Bar Association ("Washington Bar") for relief under 42 U.S.C. § 1983.

A. Factual Summary

The following facts are alleged in the Amended Complaint ("Complaint"):

In April 2002, the Washington Bar filed a complaint ("Bar Complaint") against Plaintiff John Keefe (hereinafter, "Plaintiff") arising out of an appeal from a summary judgment in an unrelated civil action.[1](Complaint, Par. 5.). The Bar Complaint alleges that a conflict of interest in the appeal violated the Rules of Professional Conduct. (Id. at Par. 6.) It asserts that Plaintiff did not inform the clients that he intended to argue that the order in the unrelated civil action should not have been entered against him and that he did not obtain the clients' written and/or informed consent to the assertion of this argument. (Id.) It further alleges that Plaintiff violated the Rules of Professional Conduct in seeking approved extensions in the appeal. (Id.)

The Bar Complaint is fraudulent. (Id. at Par. 7.) The Washington Bar, through its agents, committed perjury in administering and filing the Bar Complaint. (Id. at Par. 8.) The evidence established that Plaintiff consulted with and explained the arguments in the appeal to the clients and that the clients gave their informed consent to the conflict of interest. (Id. at Par. 9.) The clients were also informed of, and consented to, the approved extensions in the appeal. (Id. at Par. 11.)

The hearing on the Bar Complaint occurred on April 24 and 25, 2003, in Seattle Washington. (Id. at Par. 13.) At the hearing, the Washington Bar refused to let the clients testify on Plaintiff's behalf. (Id.) It refused to accept their sworn statements, and it shut down Plaintiff's defenses. (Id.) It refused to grant Plaintiff's

motion for disqualification of the hearing officer months in advance of the hearing when the rules permit a change of judge as a matter of right without substantiating, proving or supporting the claim of prejudice. (Id.).

At the hearing, during the course of Plaintiff's testimony, the Washington Bar's hearing officer said that "the proceedings were fixed," and further stated, "You still have five years to serve on your sentence, for suing." (Id. at Par. 14.).

At the close of the proceedings, Plaintiff requested an original tape or disk of the proceeding. (Id. at Par. 18.). The Washington Bar's stenographer would not agree to this or to copies of the tapes or disks. (Id.).

On December 16, 2003, the Washington Bar issued a decision suspending Plaintiff from the practice of law. (Id. at Par. 19.).

In the latter part of March 2004, the Washington Bar, through its agents, filed a motion for supplemental proceeding alleging that "reasonable cause" exists "to believe that plaintiff is suffering from a mental or physical condition that renders him incapable of defending the disciplinary proceeding." (Id. at Par. 21.) Plaintiff filed a response to the motion stating that the Washington Bar's motion for such a proceeding was contradictory and completely lacking in factual or legal support. (Id. at Par. 22.)

On March 30, 2004, the Washington Bar issued an order for a supplemental disability proceeding stating that, "Reasonable cause exists to believe that Respondent. . .

is incapable of defending disciplinary proceedings because of mental or physical incapacity." (Id. at Par. 23.).

Based on the foregoing, Plaintiff brings a claim under 42 U.S.C. § 1983. He alleges that the Washington Bar has permitted and ratified a pattern and practice of discrimination by its agents, has maintained no system of review or has failed to identify instances of illegal, wrongful and improper conduct or discipline, more closely supervise, or retrain specific agents who illegally, wrongfully and improperly engaged in such conduct and employed such discipline, and has failed to act within its guidelines. (Id. at Par. 28.) The Washington Bar and its agents acted outside their authority or otherwise beyond its guidelines in administering and initiating such proceedings against Plaintiff and during the proceedings resulting in Plaintiff's suspension. (Id. at Par. 29.) The Washington Bar and its agents have subjected Plaintiff to a deprivation of the constitutionally protected right of freedom of speech. (Id. at Par. 30.)

B. Procedural Summary

On April 26, 2004, Plaintiffs filed the Complaint.

On April 30, 2004, Plaintiffs filed an Amended Complaint.

On May 17, 2004, the Washington Bar filed a Motion to Dismiss far Improper Venue; Lack of Subject Matter Jurisdiction; Failure to State a Claim Upon Which Relief Can Be Granted; and Failure to Sue Parties Capable of Being Sued; For Disqualification; and for

Entry of Judgment, which is currently before this Court.

II. Discussion

A. Standard

1. Improper Venue

Under Federal Rule of Civil Procedure 12(b)(3), an action may be dismissed based on improper venue. 28 U.S.C. § 1391 provides the venue for cases founded on diversity of citizenship and for cases not founded solely on diversity of citizenship.

2. Lack of subject matter jurisdiction

Federal courts are courts of limited jurisdiction. Federal courts are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock West Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, when a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. See Kokkonen v. Guardian Life Ins., 511 U.S. 375, 378, 114 S. Ct. 1673, 1675 (1994).

B. Judicial Notice

The Washington Bar requests that this Court take judicial nonce of the following facts:

1. Washington Rules of Court provide the sole authority for admitting attorneys to practice in

Washington as set forth in Washington Admission to Practice Rule 1.

2. Washington Rules of Court establish the purposes of the Washington State Bar Association as set forth in Washington General Rule 12.

3. Washington Rules of Court provide the sole authority for disciplining attorneys as set forth in Washington Rules for Enforcement of Lawyer Conduct ("ELC") Rule 2.1.

4. Washington Rules of Court provide for exoneration from liability for the Washington Sate Bar Association, its officers and agents and others acting under the authority of the Washington Rules for Enforcement of Lawyer Conduct by ELC 2.12.

5. John M. Keefe was admitted to practice law in the State of Washington on November 10, 1988 by order of the Washington Supreme Court and is an active member of the Bar.

6. John M. Keefe is not admitted to practice law in the State of California according to the on-line records of the State Bar of California that can be viewed at the State Bar of California web site http://www.calbar.ca.gov/state/calbar/calbar home.jsp.

A court must take judicial nonce if a party requests it and supplies the court with the requisite information. Fed. R. Evid. 201(d). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready

determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). This Court may take judicial nonce of facts outside the pleadings without converting the motion to one for summary judgment. See Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986)(citing Sears, Roebuck & Co. v. Metropolitan Engravers Ltd., 245 F.2d 67, 70 (9th Cir. 1956)).

A court may take judicial nonce of "records and reports of administrative bodies." Mack, 798 F.2d at 1282 (citing Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380) 385 (9th Cir. 1953)). This Court may take judicial notice of its own records, and documents that are public records and capable of accurate and ready confirmation by sources that cannot reasonably be questioned. See MGIC Indem. Corp. v. Weisman, 803 F.2d. 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters of public record outside the pleadings); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (courts may take judicial notice of their own records).

The Washington Bar provides the requisite sources in support of its request for judicial notice. As such, this Court finds that the request for judicial notice of the facts presented meet the criteria set forth in Rule 201(b). This Court, hereby grants the Washington Bar's request for judicial notice.

C. Analysis

The Washington Bar seeks to dismiss this Complaint on various grounds, including improper venue, lack of subject matter jurisdiction, failure to state a claim, and

failure to sue proper parties. For the reasons explained below, this Court finds that dismissal is proper far improper venue, and even if venue were proper, dismissal is warranted for lack of subject matter jurisdiction.[2]

1. Dismissal is warranted for improper venue

Plaintiff contends that this Court has subject matter jurisdiction based on a federal question, 28 U.S.C. § 1331, and the assertion of civil rights, 28 U.S.C. § 1391(b). 28 U.S.C. § 1391(b) governs venue for actions based on a federal question. It provides for venue as follows:

in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Here, it is undisputed that Defendant the Washington Bar resides within the State of Washington. Plaintiff, then, premises venue in this district on the second factor, claiming that "a substantial part of the events or omissions giving rise to the claim occurred" in this district. This Court disagrees with Plaintiff.

Contrary to Plaintiff s assertions, a substantial part, if not all, of the events underlying the present action occurred in the State of Washington. Plaintiff is admitted to practice law in Washington. (Request for

Judicial Notice, Par. 4 and Exh. 5.) He was the attorney in a case in the Superior Court of the State of Washington for King County, which gave rise to the disciplinary proceeding of Plaintiff. (Complaint, Par. 5; Welden Decl., Par. 7 and Exh. 2.). The disciplinary proceeding was conducted before the Disciplinary Board of the Washington State Bar Association. (Complaint at Par. 13; Welden Decl. at Par. 8.) Plaintiff filed a Notice of Appeal of that decision of the hearing officer. (Welden Decl., Exh. 3.) The supplemental proceeding concerning Plaintiff's ability to defend himself is currently pending in Washington. (Complaint at Pars. 21-23; Welden Decl. at Par. 12.)

Plaintiff ignores these facts and instead asserts arguments based on personal jurisdiction - that he is a citizen of California and suffered harm in California as a result of the Washington Bar's acts. To begin with, Plaintiff's general arguments regarding the "effects test" and personal jurisdiction are misplaced here as there is no issue of personal jurisdiction. Plaintiff does cite the case of Myers v. Bennett Law Offices, 238 F.3d 1068 (9th Cir. 2001), wherein the Court found venue to be correct in the place where the plaintiff suffered "harm." Myers, 238 F.3d at 1076. However, the Court's determination was tied to its previous analysis of personal jurisdiction and its finding that the defendant's conduct was "expressly aimed" at the forum state. Here, as set forth above and alleged by Plaintiff himself in the Complaint, all underlying actions, including the Washington Bar's conduct, arose from events occurring in the State of Washington. Indeed, the disciplinary action arose from Plaintiff's license and practice of law in the State of Washington. (Welden Decl., Par. 6.). Nothing in the Complaint is tied to this

forum other than Plaintiffs citizenship. However, the statute is clear that venue is proper only in the judicial district of the defendant's residence or where a substantial part of the events giving rise to the claim occurred. As such, this Court finds that Myers is inapplicable and that venue is not proper in this judicial district. Dismissal for improper venue is therefore warranted.

2. Dismissal is warranted for lack of subject matter jurisdiction

The Washington Bar argues that this Complaint should be dismissed because the District Court has no jurisdiction to review a State Bar disciplinary proceeding. This Court agrees with the Washington Bar; even if venue were proper in this district, dismissal is proper on this separate and independent basis. First, this Court notes that, contrary to Plaintiffs' allegations, the evidence submitted by the Washington Bar shows that Plaintiffs license to practice law in the State of Washington has not been suspended yet.[3] After the disciplinary proceedings were conducted, the hearing officer entered Findings of Fact, Conclusions of Law and a Recommendation that Plaintiff be suspended from the practice of law for 6 months. (Welden Decl., Par. 10 and Exh. 2.) Plaintiff filed an appeal seeking "review by the Disciplinary Board of the Washington State Bar Association of the decision of the hearing officer. . . ." (Id. at Exh. 3.) Subsequently, supplemental proceedings were ordered to determine Plaintiff's ability to defend himself, and these supplemental proceedings are currently pending. (Complaint, Par. 23.) As such, it appears that Plaintiff's Complaint here is premature at best since no official

action has been taken with respect to Plaintiff's suspension, and he has filed an appeal with respect to the disciplinary proceedings.

Nonetheless, even assuming that Plaintiff was timely challenging his suspension he alleges in the Complaint (see Complaint at Par. 19), it is clear that this Court lacks subject matter jurisdiction to review such action. "The Ninth Circuit has held explicitly that federal district courts do not have jurisdiction to review state court orders concerning the discipline of state bar members." Doe. v. State Bar of California, 415 F. Supp. 308, 311 (N.D. Cal. 1976), aff'd, 582 F.2d 25 (9th Cir. 1978)(stating "it is our opinion that the trial judge correctly concluded that the federal courts do not have jurisdiction to interfere with disciplinary proceedings of the State Bar of California for the reasons stated in his opinion").[4] Specifically, in a case in which the Ninth Circuit affirmed a district court's dismissal of an action brought by a lawyer to enjoin and declare invalid an order of the Supreme Court of Alaska suspending him from the practice of law for one year, the Ninth Circuit upheld the rule that:

orders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. We are persuaded that it is sound.

MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969). As such, even if Plaintiff's Complaint properly alleges that he has been suspended from the practice of law, this Court lacks jurisdiction to review such action.

In his Opposition, Plaintiff relies on the case of Middlesex Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982), and argues that the cases cited above predate Middlesex. However, Middlesex is not applicable here. At issue in Middlesex was whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of pending state disciplinary proceedings within the jurisdiction of the New Jersey Supreme Court. Middlesex, 457 U.S. at 2518. Here, Plaintiff is not challenging the constitutionality of any particular rules; rather, he is challenging the specific actions taken at his hearing. More specifically, he alleges that the disciplinary proceeding was conducted in a manner unfair to him. Such allegations, however, cannot be entertained by this Court. See Rosenthal v. Justices of the Supreme Court of California, 910 F.2d 561, 566 (9th Cir. 1990)(holding that to the extent plaintiff challenges the fairness of the hearings, a review by the California Supreme Court is proper, and only the United Stakes Supreme Court has jurisdiction to review a decision by that Court).

In sum, it appears that Plaintiff's current action is premature as he has not been suspended from the practice of law. Nonetheless, even assuming that his allegation of suspension is correct, this Court is without jurisdiction to review state court orders concerning the

discipline of state bar members. As such, dismissal for lack of subject matter jurisdiction is warranted.

III. Conclusion

Accordingly, this Court grants without prejudice Defendant Washington State Bar Association's Motion to Dismiss for Improper Venue and Lack of Subject Matter Jurisdiction.

IT IS SO ORDERED.

Dickran Tevrizian,
Judge United States District Covert

Footnotes

[1] Plaintiff was the attorney in this unrelated civil action, and the summary judgment was for attorney fees and costs in the amount of $47,865.90 entered against "plaintiffs and/or their attorney of record."

[2]Initially, this Court notes that the Washington Bar properly argues that Plaintiff Keefe can only represent himself. Plaintiff Keefe purports to represent "J.M.Y.K., P.C., a California Professional Corp." However, "[a]n appearance before the Court on behalf of another party or a class may be made only by an attorney admitted to the Bar of or permitted to practice before this Court." Local Rule 83-2.1. Here, according to the pleadings on file, Keefe is barred in Washington, as he uses his Washington State Bar attorney number. See also Welden Decl., Par. 13 (noting that a search of records on-line of the State Bar of California does not

show that John M. Keefe is admitted to practice in California). Furthermore, "[a] corporation including a limited Liability corporation, a partnership including a limited liability partnership, an unincorporated association, or a trust may not appear in any action or proceeding pro se." Local Rule 83-2.10.1. Thus, Plaintiff Keefe's purported representation of J.M.Y.K., P.C., a California Professional Corporations violates the Local Rules of the Central District and is improper.

[3]The Court will dismiss an action for lack of subject matter jurisdiction under Rule 12(b)(1) only where the complaint facially fails to allege grounds for federal subject matter jurisdiction (accepting the allegations as true), or where extrinsic evidence is considered and the court determines that the jurisdictional claims lack merit. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987).

[4]The Washington Rules far Enforcement of Lawyer Conduct Rule 2.1 provides:

The Washington Supreme Court has exclusive responsibility in the state to administer the lawyer discipline and disability system and has inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline and disability. Persons carrying out the functions set forth in these rules act under the Supreme Court's authority.

CONSTITUTIONAL PROVISION INVOLVED

28 U.S.C. Sec. 1391. Venue generally

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in
(1) a judicial district where any defendant resides, if all defendants reside in the same State,
(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
(3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

42 U.S.C. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

Washington State Court Rules: Rules of Professional Conduct

ELC 2.12 EXONERATION FROM LIABILITY

(a) Association and Its Agents. No cause of action accrues in favor of a respondent lawyer or any other person, arising from an investigation or proceeding under these rules, against the Association, or its officers or agents (including but not limited to its staff, members of the Board of Governors, the Disciplinary Board, review committees, and hearing panels; hearing officers; disciplinary counsel; adjunct investigative counsel; adjunct review committee members; lawyers appointed under rule 7.7, 8.2(c)(2), or 8.3(d)(3); probation officers appointed under rule 13.8; or any other individual acting under authority of these rules) provided only that the Association or individual acted in good faith. The burden of proving bad faith in this context is on the person asserting it. The Association must defend any action against an officer or agent of the Association for actions taken in good faith under these rules, bear the costs of that defense, and indemnify the officer or agent against any such judgment.

(b) Grievants and Witnesses. Communications to the Association, Board of Governors, Disciplinary Board, review committee, hearing officer or panel, disciplinary counsel, adjunct investigative counsel, Association staff, or any other individual acting under authority of these rules, are absolutely privileged, and no lawsuit predicated thereon may be instituted against any

grievant, witness, or other person providing information.

Washington State Court Rules: Rules of Professional Conduct

RULE 1.2 SCOPE OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client consents after consultation. An agreement limiting the scope of a representation shall consider the applicability of Rule 4.2 to the representation.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct

with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) A lawyer shall not willfully purport to act as a lawyer for any person without the authority of that person.

Washington State Court Rules: Rules of Professional Conduct

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For purposes of this rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) Otherwise provided in a written agreement between the lawyer and
the governmental agency or unit; or

(2) The broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.